

But his greatest effect has been as an enabler, and his most important achievement has turned out to be his "personally-opposed-but" speech at Notre Dame in 1984.

In the twenty years since then, Cuomo's casuistry has proved useful to many a Catholic Democrat (and some Catholic Republicans). But this election exposed the flip side: the exodus of millions of Catholics who, rightly, see the Cuomo position for what it is: a wink and a nod.

Even so, the enabling industry thrives. In the last weeks of the 2004 electoral campaign, a Notre Dame dean, Mark Roche, appeared on the *New York Times* op-ed page making the case that, the evil of abortion notwithstanding, Kerry's candidacy reflected Catholic teaching better than Bush's did. On the whole, it reminded me of Marion Barry's defense of his mayoral record in Washington D.C.: "Outside of the killings, Washington has one of the lowest crime rates in the country."

As a newspaperman who has solicited and edited op-eds for the *Wall Street Journal* on three continents, I'm fairly confident that the name the *Times* wanted on its pro-Kerry op-ed page was not Mark Roche's but Notre Dame's. Which reminds us that Catholic enablers are institutions as often as individuals. Had Governor Cuomo delivered his 1984 speech at Yale or had Mark Roche been a dean at Indiana University, nobody would have paid attention.

Sometimes, to be sure, the enablers make a valid point here and there. But genuine argument is not their aim. Their aim is to get Catholics off the subject of abortion as fast as possible. As pro-life former Democratic Congressman John LaFalce puts it, "My problem with the 'personally-opposed-but' approach is that the people who make it spend 99 percent of their time talking about the 'but.'"

The list of enablers extends to some of the most prominent Catholic names in American public life. Chris Matthews of TV's *Hardball*, a pro-choice Holy Cross alum, was the 2003 commencement speaker at his alma mater despite his pro-choice public record. Paul Begala, a former Bob Casey man who later worked for Bill Clinton, the most pro-abortion President in history, now promotes the personally-opposed-but line on CNN. Like so many other Catholic enablers on the blue-state side, Begala, when pressed on abortion, responds with the They're Just As Corrupt As We Are argument, suggesting, for example, that the GOP's housing policy is somehow equal in moral import to the Democrats' platform plank on abortion.

Even the Catholic bishops undermine their case by, for example, appointing pro-choice Leon Panetta to serve on their National Review Board dealing with

priestly abuse and a woman who is a staunch supporter of Emily's List on a similar advisory board dealing with the protection of children.

In the aftermath of Senator Kerry's defeat the Democrats are wondering how it is that the first Catholic nominee for President since 1960, a man who spoke glowingly of rosary beads and his days as an altar boy, lost the Catholic vote, lost the Mass-going Catholic vote by an even larger margin, and lost it by larger margins still in key swing states such as Florida and Ohio.

They have much to ponder, as do all Americans who truly care about life, for it should be clear that a Democratic Party in its current shape is not healthy for America. We need pro-life Democrats to be able to breathe again. This means that we need a Democratic leadership that doesn't demand that Democrats vote against, among other things, judicial nominees whose only crime is their "deeply held" personal beliefs or a suspected skepticism toward the one dogma in the Democratic Party: that while all other Supreme Court decisions are malleable and must bend to the social and political agenda of the day, *Roe v. Wade* is holy writ.

As Democratic leaders perform their post-election postmortems, let us hope that someone poses the question Bob Casey would have asked: How different might the outcome have been if the Party's Mario Cuomos, Mark Roches, and Paul Begalas had over the past two decades devoted as much of their passion and public commentary to the "personally opposed" as they have to the "but"?

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## Saving the Pledge

*Vincent Phillip Muñoz*

What can you do when the Supreme Court is wrong? Amend the Constitution? It's nearly impossible. Appoint new judges? That can take years and may not work. How about strip the Court of its jurisdiction? The House of Representatives voted to do just that in September 2004, when it passed the Pledge Protection Act. The legislation would prevent all federal courts from hearing cases that challenge the constitutionality of the Pledge of Allegiance.

Although unusual, such an act is clearly permitted by the Constitution. Article III, Section 2, provides that in cases outside of its original jurisdiction, "the Supreme

Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The Constitution thus plainly grants to Congress plenary authority to make exceptions to the Supreme Court's jurisdiction.

The Framers never conceived of the judiciary as being completely independent. They equipped Congress with jurisdiction-stripping power so it could check the courts. Understanding that all power, including judicial power, is of an "encroaching nature" (Federalist 48), the Framers deliberately gave each branch of government the means to keep the other branches in line. But Congress has rarely exercised its full range of constitutional measures to check the courts. Those who decry the imperial judiciary may applaud the House for finally employing the jurisdiction-stripping power at its disposal.

Yet those who favor keeping "under God" in the Pledge should pray that the Senate quietly kills the Pledge Protection Act. Should it pass, the legislation may increase—not decrease—the likelihood that judges will find "under God" unconstitutional. The bill would prevent, moreover, the possibility of a decisive Supreme Court decision in favor of the Pledge.

Unlike a constitutional amendment, jurisdiction-stripping using Article III, Section 2, does not affect or overturn existing Supreme Court precedents. In practice it transfers final judicial authority from the United States Supreme Court to the court of last resort in each state. The tradition of *stare decisis* would likely lead these state courts to follow existing Supreme Court precedents. So if Congress strips all federal courts of jurisdiction over the Pledge, First Amendment challenges to "under God" will be decided by state supreme courts likely to apply existing Supreme Court precedents concerning the establishment of religion.

Therein lies the problem. Current Supreme Court precedents do not clearly support the constitutionality of "under God."

When the Ninth Circuit Court of Appeals originally struck down the phrase in the 2002 *Newdow* case, it thoroughly demonstrated in its written opinion that none of the three leading judicial tests of religious establishment—the "Lemon," "Endorsement," and "Coercion" tests—can sustain a religious Pledge. When the Supreme Court denied Michael Newdow standing to sue last June, it merely overturned the Ninth Circuit's result. The Supreme Court's majority opinion did not challenge the Ninth Circuit's reasoning or suggest that the Ninth Circuit had misinterpreted existing precedents.

To complicate matters, the three concurring Supreme Court Justices who wrote separate opinions

on *Newdow*'s merits failed to adopt a uniform rationale to defend the Pledge's constitutionality. Chief Justice Rehnquist stated that "under God" is "in no sense a prayer, nor an endorsement of any religion." Reciting the Pledge, he concluded, "is a patriotic exercise, not a religious one." Justice O'Connor craftily amended her "Endorsement" approach, adding a contrived four-part subtest to accommodate "under God." Justice Thomas implicitly rejected both Rehnquist's and O'Connor's arguments, conceding that "as a matter of our precedent, the Pledge policy is unconstitutional." A fair construction of the "Coercion" test, according to Thomas, requires the removal of "under God." He therefore concluded that the whole edifice of church-state jurisprudence should be torn down and rebuilt from scratch.

Where does this leave state supreme courts should the Pledge Protection Act become law and they have to decide a subsequent Pledge case? Hopelessly lost, no doubt, but also free to invoke different precedents to reach whatever results they want. Some state courts might invoke Justice Rehnquist's or Justice O'Connor's reasoning to uphold the Pledge. Others could, paradoxically, cite Justice Thomas' "Coercion" analysis (while ignoring his call to overturn it) and strike down "under God." Whatever state supreme courts decide, their verdicts could not be appealed to a federal tribunal. The result could be a myriad of confusing and conflicting state court decisions with "under God" constitutional in some states and unconstitutional in others. This is no way to save the Pledge.

Those favoring "under God" would be better advised to go on the judicial offensive and to get a new case before the Supreme Court. Justices Rehnquist, O'Connor, Thomas, and Scalia will vote to uphold "under God." If all four Justices remain on the bench, tremendous pressure would fall on each of the remaining Justices to become the decisive fifth vote.

That fifth vote likely would be Justice Anthony Kennedy. If the Pledge goes down, Kennedy will take the blame. In 1992 he devised the "Coercion" test in the school prayer case *Lee v. Weisman*. In *Lee*, Kennedy wrote that students who attend public school graduations that include prayers are "psychologically coerced" to participate in a religious exercise. Prayer at graduation violates the Constitution, Kennedy wrote, even if students are asked only to remain respectfully silent while others pray.

Michael Newdow won at the Ninth Circuit in part because Kennedy's 1992 opinion directly applies to public school recitations of the Pledge. As in *Lee*, Pledge recitations involve public school personnel

directing students in a structured activity with explicit religious content. Even if the Pledge is patriotic (as Rehnquist suggests) or if it contains minimal religious content (O'Connor's claim), it still entails the affirmation that God exists. When public school teachers lead the Pledge in class, under Kennedy's test they "psychologically coerce" students to participate in a religious exercise. In fact, as Justice Thomas noted in his *Newdow* opinion, under the "Coercion" test, grade-school Pledge recitations pose a more clear-cut constitutional violation than graduation prayers. High-school graduations are one-time, non-mandatory events, and graduating seniors are almost (if not already) adults. Pledge recitations involve a daily recital by more impressionable grade-school children who are obligated by law to attend school. If a single nondenominational prayer in front of high school seniors at graduation is unconstitutional, so too is a teacher-led, daily recital by third-graders that explicitly refers to God.

When the Supreme Court reversed *Newdow* on narrow technical grounds, Kennedy was spared from facing the consequences of his own jurisprudence. He will not get off so easily the next time a Pledge case comes up. The most strategic way to save the Pledge would be to force Justice Kennedy to vote on its constitutional merits.

It's no secret that Kennedy is attentive to public criticism. Given the Pledge's overwhelming popularity among the American people and the fact that the nation's law-school elites have not rallied against it, if forced to cast the decisive vote Kennedy will likely vote to avoid bringing scorn upon himself. Unlike Justices Stevens, Souter, Ginsburg, and Breyer, moreover, he has never embraced the ACLU's "wall of separation" ideology. The conditions are ripe for Kennedy to support the Pledge.

Kennedy could most easily join an opinion that did not require him to admit the problems with his "Coercion" test. Justice Rehnquist offered one in *Newdow* by distinguishing *Lee*'s graduation prayer from the Pledge: since the Pledge is patriotic, Rehnquist argued, it does not "psychologically coerce" religious practice. The problem with this reasoning is that it assumes that patriotism and religion are mutually exclusive categories—that is, because the Pledge is patriotic, it is not religious. In reality the Pledge is patriotic and religious, but the niceties of clear analysis need not prevent Kennedy from joining Rehnquist.

A different line of reasoning that Kennedy might also find appealing would be to describe the Pledge as merely historical. Most of the briefs supporting the Pledge in *Newdow* argued that "under God" reflects the historical fact that the Founding Fathers believed

that our rights and freedom come from God. While it is true that the Founders declared our rights to be endowed by the Creator, the obvious problem with this argument is that the Pledge is framed in the present tense and is recited as a personal affirmation. Students don't stand to pledge allegiance to the historical observation that the Founders believed we were "one nation, under God." Each individual pledges his or her allegiance to the flag and to today's American republic, which is described as "one nation, under God." Nothing in the text of the Pledge of Allegiance suggests that it is merely a history lesson. Nonetheless, Kennedy could easily sign on to the argument.

A third, and more sensible, way to defend the Pledge's constitutionality has been offered by Justice Scalia. Dissenting in *Lee*, Scalia interpreted the establishment provision of the First Amendment to prohibit "legal coercion" of religious belief or practice, "legal coercion" being defined as the use of force or penalties. Under Scalia's "legal coercion" standard, students could not be punished for not reciting the Pledge (for example, by being suspended from school), but the Pledge could be said voluntarily in public schools.

Kennedy eschewed "legal coercion" in *Lee* and would be unlikely to sign on to such an opinion now. But he would not need to embrace Scalia's approach for the Pledge to pass constitutional muster. Kennedy could write his own concurrence adopting one of the arguments mentioned above or he could follow O'Connor's revised "Endorsement" test. A Pledge victory requires only that he vote in its favor. But for Kennedy to vote at all requires that a Pledge case reach the Supreme Court, which is exactly what the Pledge Protection Act would prevent.

As evinced by its decision to hear two Ten Commandments cases during the 2004-05 term, the Supreme Court will continue to decide controversial religious liberty disputes. Congress is not going to strip the Court of jurisdiction over all church-state cases. It makes little sense for it to strip jurisdiction in the one area where the Court could reach the exact result Congress seeks to achieve.

A Supreme Court victory can never be guaranteed, but a Pledge challenge can be won. "Under God" should be protected. But how it is protected matters. Rather than take the case away from the federal judiciary, the issue should be brought to it, and the Pledge should be protected in all fifty states by the Supreme Court.

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